

LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U.

FILED

JUN 6 1952

CHARLES ELMORE

IN THE
Supreme Court of the United States

OCTOBER TERM, 1951

No. 439375

CALMAN COOLER,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
COUNTY COURT OF WESTCHESTER COUNTY, STATE
OF NEW YORK, AND BRIEF IN SUPPORT THEREOF**

PETER L. F. SABBATINO,
Counsel for Petitioner.

THOMAS J. TODARELLI,
DANIEL J. RIESNER,
of Counsel.

TABLE OF CONTENTS

	PAGE
Petition	1
A—Summary Statement of Matter Involved	1
B—The Crime Charged	2
C—Question Presented	3
D—Brief Summary of the Facts	4
E—Circumstances Under Which Confession Ob- tained	5
F—Grounds upon which Jurisdiction of this Court is Invoked	6
G—Reasons Relied Upon for the Allowance of the Writ	7
Brief	11
Opinion Below	11
Jurisdiction	11
Argument	11
POINT I—The admission in evidence of petition- er's confession was a violation of the rights of petitioner under the due process clause of the Fourteenth Amendment of the Con- stitution of the United States	12
Conclusion	33
Appendix A—United States Constitution, Amend- ment XIV, Section 1	36
Appendix B—Title 28, Sec. 1257, U. S. Code	36

	PAGE
Appendix C—Federal Rules of Criminal Procedure ..	36
Appendix D—Code of Criminal Procedure of New York, Sec. 165	36
Appendix E—Penal Law of New York, Sec. 1844	37
Appendix F—Penal Law of New York, Sec. 1044 ...	37
Appendix G—Section 399 of the Code of Criminal Procedure of the State of New York	37
Appendix H—Section 395 of the Code of Criminal Procedure of the State of New York	37
Appendix I—Appellate Division, Second Department, Special Rules— <i>Improper publicizing of court proceedings</i>	38
Appendix J—Section 618 B of Code of Criminal Procedure, State of New York	38

CASES CITED

Ashcraft v. Tennessee, 322 U. S. 143	7, 21, 33
Bram v. United States, 168 U. S. 532, 523, 540-542 ..	5
Gallegos v. Nebraska, 342 U. S. 55	7, 34
Haley v. Ohio, 332 U. S. 596, 599, 606	5, 7, 33
Harris v. South Carolina, 338 U. S. 68	5, 7, 21
Lisenba v. California, 314 U. S. 219, 240	33
Lyons v. Oklahoma, 322 U. S. 596, 597	5, 7, 34
Malinski v. New York, 324 U. S. 401, 404	5, 7, 21, 34
McNabb v. United States, 318 U. S. 322	21
People v. Barbato, 254 N. Y. 170, 176	33
People v. Levan, 295 N. Y. 31, 32	34
People v. Moran, 246 N. Y. 100, 106	34
People v. Mummiani, 258 N. Y. 394, 398	33

Stroble v. California, 343 U. S. (96 L. ed. (Adv. Op.)) 529	7
Stromberg v. California, 283 U. S. 359, 367, 368	5
Turner v. Pennsylvania, 338 U. S. 62	5, 7, 21
United States v. Carignan, 342 U. S. 36	7
Ward v. Texas, 316 U. S. 547, 550	21, 33
Watts v. Indiana, 338 U. S. 49	7
White v. Texas, 309 U. S. 631	7

STATUTES CITED

CODE OF CRIMINAL PROCEDURE OF NEW YORK:	
Section 165	21
Section 395	12
Section 399	4
Section 618-b	14
NEW YORK PENAL LAW:	
Section 1044	2
Section 1844	21
UNITED STATES CODE:	
Title 28, Section 1257	6

RULES CITED

RULES OF APPELLATE DIVISION:	
Rule Against Improper Publicizing	22
RULES OF THE SUPREME COURT OF THE UNITED STATES:	
Rule 38	6, 7
FEDERAL RULES OF CRIMINAL PROCEDURE:	
Rule 5	21
UNITED STATES CONSTITUTION:	
Fourteenth Amendment, Section 1	2, 3, 5, 7

IN THE
Supreme Court of the United States

OCTOBER TERM, 1951

No.

CALMAN COOPER,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
COUNTY COURT OF WESTCHESTER COUNTY,
STATE OF NEW YORK**

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED
STATES, AND THE ASSOCIATE JUSTICES OF THE SUPREME
COURT OF THE UNITED STATES:

Your petitioner Calman Cooper respectfully represents
the following:

A.

Summary Statement of Matter Involved

The petitioner Calman Cooper, together with Harry A. Stein and Nathan Wissner, was convicted on December 21, 1950, of the crime of murder in the first degree, after trial before the Hon. Elbert T. Gallagher and a jury in the County Court, Westchester County, State of New York.*

* The jury deliberated almost ten hours (Rec., 98):

On December 27, 1950, all three were sentenced to be executed* (Rec., 2890-2).**

The New York State Court of Appeals on March 6, 1952, unanimously affirmed, without opinion, the judgment of conviction.

Petitioner Cooper is now under sentence of death.

At the trial, the People were permitted to put into evidence a confession*** of petitioner Cooper, over his objection that such admission was in violation of the due process clause of the Fourteenth Amendment of the Federal Constitution, an objection seasonably asserted at every stage of the trial, as well as on appeal before the Court of Appeals.****

B.

The Crime Charged

The indictment charged the crime of Murder in the First Degree, based upon felony murder,***** committed by Calman Cooper, Harry A. Stein and Nathan Wissner, as well as by Benny Dorfman, whose trial, on motion of the District Attorney, was severed, and who testified for the prosecution (Rec., 8-11).

*Mr. Justice Jackson granted a stay of execution on April 7, 1952, pending a determination of this application.

Mr. Justice Reed, by order duly entered on June 3, 1952, extended petitioner's time within which to file his petition and brief to June 6, 1952.

** References herein, unless otherwise indicated, are to the pages of the certified record of the trial submitted herewith.

*** People's Exhibit 59, Rec., 2875-2886.

**** Rec., 160, 1174, 1275-1280, 1305, 1444, 1451, 1520, 1521, 1522-1542, 2273-2275.

***** Section 1044 of the State Penal Law.

C.

Question Presented

Whether the right of a defendant to be accorded due process of law under the provisions of the Fourteenth Amendment of the Constitution of the United States has been invaded and violated:

- (a) when a confession, conceded by the testimony of State Police to have been obtained from defendant some 36 hours after he had been arrested on the street near his home in the City of New York, and thence carried off to an isolated barracks of the State Police in a county outside the City of New York, where he was incarcerated; incommunicado, without opportunity to consult with friends or counsel, kept handcuffed, fully clothed, at all times, and subjected to incessant questioning for at least twenty hours between the evening of June 5th and the late evening of June 6th, before confessing, during which period of time, arraignment was delayed in violation of State Law, is admitted in evidence against the defendant on ~~trial~~ for his life?
- (b) when, in addition to the above conceded facts, there is put in issue the defendant's claim that he was physically beaten to extort his confession, and there is indisputable evidence of marks upon the defendant's body, which could have been caused only by the infliction of physical violence, a jury is permitted to speculate that such physical injuries may have been self-inflicted, in the absence of any proof whatever that they were or could have been self-inflicted, and thus ignore such marks of physical injury as indicating that the confession was forcibly extorted in violation of the defendant's right to due process of law?

- (c) when, in addition to the above facts, it appears that, during the period of defendant's incarceration, his brother and his elderly father were likewise incarcerated and held incommunicado, without arraignment, as required by State Law, and the defendant is driven to confess in order to obtain their release from such unlawful incarceration;
- (d) when a confession is allegedly obtained under the circumstances set forth above, and the issue of the voluntariness of the confession is submitted to the jury, the jury is instructed that it may nevertheless find the defendant guilty upon other evidence in the case, although it may determine that the confession was obtained by force and coercion, —and the trial Court refuses to instruct the jury to state specifically, in reporting its verdict, whether the jury found the confession to be a voluntary one?*

D.

Brief Summary of the Facts

On April 3, 1950, at about 3:00 P. M., at which time it was raining, four robbers held up a truck owned by the Reader's Digest Association on its private roadway, at Chappaqua, New York. One William Waterbury, accompanied by Andrew Petrini as messenger, was driving the truck to deposit company funds in a local bank. One of the robbers fired a single shot which struck Petrini's head and caused his death shortly thereafter.

Except for the testimony of the accomplice Dorfman,** there was no direct testimony by Waterbury or any other

*Rec., 2783.

** Section 399 of the Code of Criminal Procedure requires corroboration.

witness identifying Cooper as one of the robbers. The other proof as to him was essentially circumstantial.

The testimony of the accomplice Dorfman and the circumstantial evidence against Cooper were bolstered by a confession of Cooper extorted from him, as we shall later show, in violation of the due process clause of the Fourteenth Amendment of the Federal Constitution—a confession, the admissibility of which petitioner resisted on that constitutional ground, at the trial and on appeal.

Where such a confession is improperly admitted in violation of a petitioner's constitutional guarantees, this Court has not attempted to evaluate the effect of the error and has not hesitated to reverse the judgment of a State Court, even though other credible evidence remained in the case.

Bram v. United States, 168 U. S. 532, 533, 540-42;
Stromberg v. California, 283 U. S. 359, 367, 368;
Lyons v. Oklahoma, 322 U. S. 596, 597;
Malinski v. New York, 324 U. S. 401, 404;
Haley v. Ohio, 332 U. S. 596, 599, 606;
Turner v. Pennsylvania, 338 U. S. 62;
Harris v. South Carolina, 338 U. S. 68.

E.

Circumstances Under Which the Confession of Cooper Was Obtained

The undisputed facts prove that the confession of petitioner Cooper was obtained from him as a result of brutal beatings inflicted by State Troopers, coercive conduct, mental torture, interrogation in relays over a long period of time—all in violation of the due process clause of the Fourteenth Amendment of our Federal Constitution.

Reserving for the Brief attached hereto the full details showing how the confession was extorted from him, we

state now that he was arrested on a Monday morning, June 5, 1950, and began his confession about 37 hours later. He was not arraigned in a Court of Justice until Thursday night, almost 85 hours after his arrest. When Dr. Vosburgh, the regular jail physician, a few hours later, examined Cooper and his two co-petitioners, he found on each one varied bruises and injuries, the result of beatings, as we fully demonstrate in our annexed Brief.

F.

Grounds Upon Which the Jurisdiction of This Court is Invoked

We respectfully submit that this Court has jurisdiction to entertain this petition for a writ of certiorari by virtue of Section 1257 of Title 28, U. S. C., and Rule 38 of the Rules of The Supreme Court of the United States.

At the trial and on his appeal to the Court of Appeals of the State of New York, the petitioner, invoking the protection of the Fourteenth Amendment of the United States Constitution, challenged the admissibility of his confession.

After the Court of Appeals of the State of New York affirmed the judgment of the County Court of Westchester County on March 6, 1952, it amended its remittitur on April 18, 1952, to read, as applicable to the petitioner, as follows:

“questions under the Federal Constitution were presented and necessarily passed upon by this Court, viz: (1) whether the admission in evidence of the confession of the defendant Cooper violated his rights under the Fourteenth Amendment to the Constitution

of the United States, * * *. This Court held that the rights of the Defendants under the Fourteenth Amendment of the Constitution of the United States had not been violated or denied”.

G.

Reasons Relied Upon for the Allowance of the Writ

The Court of Appeals of the State of New York has decided a federal question of substance in a way “probably not in accord with applicable decisions of this Court” (Rule 38 of the Rules of the Supreme Court), in holding that the rights of petitioner Cooper under the Fourteenth Amendment of the Constitution of the United States had not been violated or denied, in the receipt in evidence against him of a confession obtained under circumstances unmistakably showing that it was obtained through coercion.

See:

White v. Texas, 309 U. S. 631;

Ashcraft v. Tennessee, 322 U. S. 143;

Lyons v. Oklahoma, 322 U. S. 596;

Malinski v. New York, 324 U. S. 401;

Haley v. Ohio, 332 U. S. 596;

Watts v. Indiana, 338 U. S. 49;

Turner v. Pennsylvania, 338 U. S. 62;

Harris v. South Carolina, 338 U. S. 68;

Gallegos v. Nebraska, 342 U. S. 55;

United States v. Carignan, 342 U. S. 36;

Stroble v. California, 343 U. S. (96 L. ed. (Adv. Op.)) 529.

Although this Court has enunciated and often reiterated the rule that the Constitutional guaranty in the Fourteenth Amendment of "due process of law" forbids a State from taking a defendant's life by using to convict him a confession forced from him by duress, it is apparent that that rule has not been readily accepted by at least some State Police and prosecutors. Instances constantly recur illuminating the various devices and subterfuges whereby attempts are made to emasculate the guard provided by that rule against the obnoxious practices of the Star Chamber, the Inquisition and the despotic power of tyrants.

The plight of your petitioner is a further illustration of a clear disregard of "that fundamental fairness essential to the very concept of justice".

Unless this Court intervene, not only will your petitioner and his co-petitioners who were defendants with him be deprived of life, but the precedent of this case in the great State of New York will indubitably be widely taken as a "Manual of Procedure" of methods which will not be condemned as oppressive though they provide an efficient means of extracting an unwilling confession.

Surely it is in contravention of "due process of law" that a defendant be imprisoned in an isolated place where no one is permitted to see what goes on and what tortures defendant suffers at the hands of his captors over a period of two days and an intervening night, with the knowledge that his brother and elderly father (against whom no accusation is made) are likewise confined, in handcuffs, in similar isolation from any friend, or family, or counsel—and all this in clear violation of a statutory requirement of prompt arraignment—during which unlawful imprisonment, for hour after hour after hour, day and night, the defendant's protestations of innocence are ignored by changing groups of armed troopers who sub-

ject him to endless questioning, until finally he buys the freedom unlawfully withheld from his father and brother by sacrificing himself, yielding up the demanded confession.

Is there not good and sufficient reason for allowing the writ of certiorari in the case at bar if only to decide whether a defendant, who has been questioned persistently while illegally held without arraignment, and who bore the marks of inflicted injuries, where the only witnesses to what transpired are his captors and himself, must waive his constitutional privilege against being compelled to testify in a criminal case against himself, as a condition of providing testimony that he was cruelly beaten and subjected to torture and thereby forced to confess?

Otherwise, this case stands for the proposition that if State Police bar any witnesses to their beating of a defendant save the perpetrators and the victim, so that there is no one else to contradict the Police who deny brutality, then the mute evidence of the marks of the inflicted injuries and the proof of the unlawful imprisonment, incommunicado, in violation of State Law, during which illegal detention there is subjection to persistent and prolonged police interrogation by relays of questioners, are not enough to establish reasonable doubt that the confession was voluntary.

Appended hereto is a brief in support of this petition.

Wherefore your petitioner, Calman Cooper, prays that a writ of certiorari may issue out of and under the seal of this Court to the County Court of Westchester County, State of New York, commanding the said Court to certify and send to this Court for review and determination as provided by law, this cause and a complete transcript of the Record and all proceedings had herein, as heretofore remitted to the said County Court of Westchester County by the Court of Appeals of the State of New York; and

that the order of the Court of Appeals of the State of New York affirming the judgment in this cause may be reversed, and that petitioner may have such other relief as this Court may deem appropriate.

Dated: June 6, 1952.

CALMAN COOPER,
Petitioner,

By PETER L. F. SABBATINO,
Counsel for Petitioner.

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

I hereby certify that I have examined the foregoing petition for a writ of certiorari, and that in my opinion it is well founded and the cause is one in which the petition should be granted.

PETER L. F. SABBATINO;
Counsel for Petitioner.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1951

CALMAN COOPER,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

**BRIEF IN SUPPORT OF PETITION FOR
A WRIT OF CERTIORARI**

Opinion Below

The Court of Appeals of the State of New York affirmed without opinion the judgment of conviction and death sentence imposed upon petitioner.

Jurisdiction

The statement under which the jurisdiction of this Court is invoked, as well as the statement of the question presented, and the factual matter relevant to this application, appear in the petition to which this brief is annexed.

Argument

Petitioner urges that he has been convicted of the crime of murder, and sentenced to death, as the result of a trial in which there was received in evidence against him, over

his objection and exception; a confession obtained after prolonged interrogation, which confession was the result of police violence and coercion and the continuing fear and effect thereof, while petitioner was being illegally detained, incommunicado, all in violation of the due process clause of the Fourteenth Amendment of the Constitution of the United States.

POINT I

The admission in evidence of petitioner's confession was a violation of the rights of petitioner under the due process clause of the Fourteenth Amendment of the Constitution of the United States.

The question here presented is whether the confession of petitioner (Exh. 59, 2874-86),* received in evidence over his objection and exception, was made under such circumstances as to render it inadmissible under the due process clause of the Fourteenth Amendment to the Constitution of the United States and under the decisions of this Court interpreting that clause.

The conduct of the District Attorney of Westchester County and of the State Troopers, from the time that the Troopers seized petitioner Cooper until they secured his confession, weighed in the light of petitioner's injuries noted later by the official jail physician, forges an unanswerable argument that inescapably leads to but one conclusion—that Cooper's confession was not voluntary, but the result of coercive conduct,** by law enforcement officers, repugnant to all civilized societies and condemned by guaranties contained in our Federal Constitution.

* Only a single copy of Vol. V (the certified copy), which contains the exhibits, is filed with the Clerk of the Supreme Court.

** Such a confession is also barred by Section 395 of the New York State Criminal Code of Procedure.

Calman Cooper was arrested on Monday morning, June 5, 1950, at about 9:10 A.M., confessed late Tuesday night, was arraigned late Thursday night, was found by Dr. Vosburgh, the jail physician, with multiple injuries on various parts of his body, a few hours later, on Friday morning, and proved, at his trial, through the lips of hostile witnesses, the utter indifference and contempt of law-enforcement officers for constitutional processes.

Let us examine in detail, and as far as possible, chronologically, the events that should have led the trial judge, and we respectfully contend, must lead this Court, to reject Cooper's confession, as a voluntary one, because obtained in violation of the Constitution.

Seven or eight State Troopers (Rec., 1337-8), accompanied by a New York City Detective (Rec., 1965), arrested Calman Cooper as a *participant in the murder* (Rec., 2071, 1400, 1423, 1181, 1364), in New York City, on West 120th Street, near his home, on the public streets, shortly after 9:10 A.M., on Monday, June 5, 1950 (Rec., 1310, 2998). At the same time, they also arrested his sixty-five year old father (Rec., 1311, 2998). They took both to the East 67th Street Police Station (Rec., 1965), where father and son were not placed in cells, but hidden away, handcuffed, in a police bedroom (Rec., 1337). They were not booked at the East 67th Street Police Station by any of the arresting officers (Rec., 1335-1341), although, to the admitted knowledge of the officers, they were required to do so (Rec., 1963).

Shortly thereafter, the Troopers spirited them away to the barracks of Troop K at Hawthorne, New York, located in another county, forty miles from the place of arrest (Rec., 1310).

Later that same Monday, the State Troopers arrested petitioner's brother, Morris Cooper, and brought him to the same barracks (Rec., 2040).

In order that this Court may properly appraise the conduct of the State Troopers toward the petitioner, we detail their conduct toward petitioner's elderly father and his brother as well.

At the barracks, the troopers put all three Coopers through what they consider the regular routine (Rec., 1185, 1191). They took photographs of the petitioner (Rec., 3006), of his brother Morris (Rec., 3004), and of his father Charles (Rec., 3002). They gave each prisoner separate criminal identification numbers, with June 5, 1950, as the date of arrest (three photographs, *supra*).

The Troopers took the finger-prints, the pedigree and a photograph of Cooper's father (Rec., 2998-9), although Sgt. Sayers, the arresting officer, admitted that he did not charge petitioner's father with a crime (Rec., 1364). They even filled out an arrest card, but, although the printed form (Rec., 2999a) provides for a "Brief History of Crime Committed", they alleged, as we have indicated, on that card, *no crime* against one whom they had photographed, finger-printed, and thereafter kept incarcerated in handcuffs (Rec., 1371) for *two and a half days* (Rec., 1374, 1375), without ever questioning him during that time—all without any legal sanction except their own arrogation of authority (Rec., 1371). The lawless State Troopers, in holding Charles Cooper, Morris Cooper and Beverly Wissner, defied the specific provisions of Section 618-b of the New York State Code of Criminal Procedure, which requires an order of a judge or Court to hold a person as a witness in a criminal proceeding. That illegal practice, admittedly a routine with them (Rec., 2251, 2256-7), has the approval of their superiors (Rec., 2256-7), and, from the consequences of which illegal practice they escape, or seek to escape, by having the one illegally detained execute a handy mimeographed form of general release. Only when it suits their purpose do they free their victims

(see release executed by Beverly Wissner, wife of co-petitioner Nathan Wissner, Rec., 2255, 2960).

The barracks, excepting for the use of the Troopers themselves, contained no sleeping facilities whatever for Cooper's father, and, in fact, none of the usual facilities, for eating and other necessities. There is no outside supervisory power that comes in to question whether or not persons held there are getting good treatment (Rec., 2013).

At the trial, the People sought to soften the illegality of the arrest and incarceration of Cooper's father, by offering *oral testimony* that Cooper's father was held on "suspicion" (Rec., 1214, 1215), or "investigation of a felony" (Rec. 1370),—testimony, however, which was contradicted by their own *written record* of June 5th (Rec., 2999a), which, upon its face, showed no reason for the arrest and detention.

During the trial, the District Attorney in chambers, brazenly argued—in the face of all the preceding facts—"that there is no proof of incarceration of Cooper's father", but, "there is proof that he was up in the barracks" and "it is open to the public" (Rec., 1304).

What happened to Cooper's father and to Wissner's wife is a part of the total picture of what happened to petitioner Cooper between his arrest and his arraignment. To establish the involuntariness of the confession, the defense called to the witness stand State Troopers—all hostile witnesses—who had had contact with petitioner Cooper before he confessed late Tuesday night.

No one would expect—certainly no Judge of this Court—that the defense would accomplish a miracle, and secure direct proof from a State Trooper that he had participated in beating Cooper, or that he had witnessed his fellow-officers do so.

The People, as we shall later show more fully, sought to explain the injuries of Cooper by two theories—first by

a fantastic story—exploded by their witness Jepperson and Dr. Vosburgh—that Sgt. Sayers inflicted the injuries when he arrested Cooper on a public street in New York City, and, secondly,—the only explanation urged by the prosecutor in summation,—that they were self-inflicted (Rec., 2708, 2712).

The trial court erroneously gave weight to the flimsy explanation offered by the People and improperly submitted the issue as one of fact for the jury.

We respectfully contend that this Court must reach a different conclusion—that there was no issue of fact to submit to the jury, that it was the duty of the trial court, upon the facts and circumstances we shall now detail, to reject the confession as involuntary, as a matter of law.

Calman Cooper, from the time he was imprisoned, was always handcuffed, watched by armed Troopers, held in one room, fifteen by twenty feet, which contained desks, filing cabinets, chairs, etc., a sketch of which appears on page 2964 (Rec., 1369).

The isolated barracks at Hawthorne (Rec., 1339, 1340, 1599), contain no facilities for prisoners (Rec., 1369). Some Troopers always saw Cooper, during the day or night, sitting on a chair, but never saw a mattress (Rec., 2004, 2008, 1356); others testified that they saw Cooper on a mattress after midnight, Monday. If a certain Trooper is to be believed, he saw Cooper in an office, with a light burning throughout the night (Rec., 1431), lying on a bare mattress on the floor, with both hands handcuffed (Rec., 1399, 1435). He was fully clothed at all hours (Rec., 1397). He had his coat, trousers, shoes and socks on (Rec., 2103). There is no showing where, when, or how, petitioner slept on Tuesday or on Wednesday.* It is interesting to note that, when

* It is apparent that the State Troopers fabricated the story of a mattress, for certainly they would not permit Cooper and Mrs. Wissner to sleep on the same mattress in the same office on the same night. See further discussion on this inconsistency on page 19, *infra*.

helpful to the prosecution to do so, testimony was given by a State Police employee that Mrs. Wissner slept on a mattress on Wednesday night, June 7—on the very mattress and in the very room allegedly occupied by Cooper (Rec., 1656, 1657).

On Monday, the day of his arrest, petitioner Cooper was subjected to continuous questioning from 8:00 P. M. to midnight, or 1:00 A. M. the following day, by different Troopers.

On Tuesday morning, he was again subjected to continuous questioning. Such grilling continued throughout the day until 6:00 P. M. The twelve page confession, reduced to writing and signed on Wednesday morning, began about 10:00 P. M. on Tuesday night (Exh. 59, Rec., 2874-86), and did not end until 2:00 A. M. on Wednesday morning (Rec., 1317).

From what preceded the giving of the confession, and from what followed, we ask this Court to reach the evident conclusion that the confession was extorted.

In the light of reason, let us test the veracity of the Troopers—that they questioned, but did not beat, Cooper.

Sgt. Barber of the State Police, admitted that he began questioning Cooper, in the presense of armed guards (Rec., 1393, 1394, 1403, 1404), at 8:00 P. M. on Monday night, eleven hours after his arrest (Rec., 2072). He questioned Cooper for five hours (Rec., 2074, 2077, 2081). Sgt. Sayers and Trooper Buon were with him during those five hours (Rec., 2073). They, too, participated in the questioning (Rec., 2073). Cooper persisted in his denials of complicity (Rec., 2099). The Troopers admitted that their questioning resulted in failure (Rec., 2075, 2102). When Sgt. Barber retired at 4:00 A. M. Tuesday—19 hours after petitioner Cooper's arrest—Cooper had not confessed (Rec., 2080). Sgt. Sayers and Trooper Buon resumed their questioning on Tuesday morning, and questioned Cooper until noon time (Rec., 1357, 1361 2075, 2102). In

fact, Sgt. Barber "questioned" him most of the time, from Tuesday morning until around dinner time (Rec., 2074). Trooper Buon, too, "questioned" him, on and off, all afternoon on Tuesday (Rec., 2119).

There can be no doubt but that the purpose for which petitioner was held incommunicado for days at State Police barracks was solely one to afford the State Police an uninterrupted illegal opportunity to extort from petitioner, by whatever means they were disposed to use, the confession that was later used against him.

Witnesses for the People testified that Cooper confessed—not because, as we contend, he was beaten—but because he wanted to secure the freedom of his father and brother (Rec., 2115, 2116, 1372). That desire came to him at 6:00 P. M. Tuesday—after he had been "questioned" by Sayers, Barber and Buon, all day (Rec., 2115). *Handcuffed son was led to the presence of handcuffed father* when the alleged bargain was sealed (Rec., 1372). The alleged bargain of Tuesday night, the People contend, led to the release of the handcuffed father, not on the same night, but on the following night, Wednesday, June 7th, at about 9:00 P. M. (Rec., 1380, 1382).

It is highly significant that Sgt. Sayers, Sgt. Barber and Trooper Buon, the chief "questioners", never had a stenographer present when they "questioned" Cooper—although Mrs. Anna A. Klaus, a stenographer attached to Troop K, at Hawthorne Barracks, was available both on Monday afternoon (Rec., 1574) and on Tuesday morning, when she reported for duty, but was strangely denied access at 9:00 A. M. (Rec., 1641), to the office where she regularly did her work (Rec., 1634) and where Calman Cooper then was, on the pretext that someone was sleeping there (Rec., 1642) and, forsooth, they dared not disturb him.

It is more logical to infer, from the Troopers' refusal to have Mrs. Klaus work in her usual room on Tuesday morn-

ing, that the Troopers did not dare to have her become a witness to what they intended to continue to do to the only stranger in the room, Calman Cooper. That Tuesday morning, at 8:00 A. M. (Rec., 1397), Trooper Hess had arrived to relieve Trooper Leon in guarding Calman Cooper (Rec., 1396). Cooper had on his trousers, shirt, socks, and perhaps his shoes (Rec., 1397). Between 8:15 and 8:30 that morning Troopers Lambrecht and McLaughlin arrived at the same office (Rec., 1402), at which time Cooper was awake (Rec., 1402). When, therefore, the Troopers denied Mrs. Klauss entry, later, at 9 A. M., on the alleged ground that Cooper was asleep, it is apparent that they lied to her to bar her from witnessing their continued "third degree" activities.

In the determination of the issue of whether the confession was extorted, there is a consideration even more significant than the failure of the Troopers to use an available stenographer. *None of the "questioners" made a single written notation at any time of what their "questioning" revealed for their five hours' work on Monday night and for their work on Tuesday, from morning to 6:00 P. M. (Rec., 2072, 2074, 2101, 1352, 1357).*

How could they fail to take a single note, after questioning Cooper in relays, during long hours Monday night and even longer hours all day Tuesday, if, in truth, they were merely questioning him? They conveniently, but falsely, explained their conduct of brutality by testifying that they were questioning him, and yet, were unable to repeat what they asked and what he answered, because, in truth, Monday night and all day Tuesday were devoted, not to interrogating him, but to beating him.

Nor did the State Troopers use as stenographer, during the long, alleged periods of "questioning", Trooper McLaughlin, himself a stenographer, who ultimately typed petitioner's confession on Tuesday night, for he was pres-

ent at the barracks during all the period of time that petitioner was held there, and, in fact, worked in the very room where petitioner was held. (Rec., 1195).

The realities of the situation herein disclosed lead to the inevitable conclusion that the bruises noted Friday morning were the results of the secret "questioning" of the preceding Monday and Tuesday.

Did the solicitous State Troopers ever really supply Cooper with a mattress Monday night to rest himself—both hands handcuffed, fully dressed, with a light burning, in an office crowded with office furniture? It was clearly an afterthought by the Troopers, in anticipation of a probable review by the Courts of the issue of brutality, in an effort to escape the logical inference that Cooper, without sleep, was subjected to many more hours of questioning and physical violence.

Sgt. Sayers, the arresting officer and chief "questioner" testified unequivocally that *he never saw a mattress at any time* (Rec., 1350, 1351, 1358); nor did Mrs. Klaus on Wednesday morning (Rec., 1637), *after the confession. No such pretended sleeping accommodations had ever been supplied to any one in her previous three years of employment there* (1647).

On the issue of the voluntariness of the confession, we respectfully ask this Court to draw its own proper inferences from the conduct of the State Troopers when they arrested Calman Cooper in New York City (Rec., 1225). They never notified the District Attorney when they brought Cooper to the East 67th Street Police Station, or when they brought Cooper to the barracks (Rec., 1225). The State Troopers never notified the District Attorney when they questioned Cooper on Monday night for five hours. They never notified him when they questioned Cooper on Tuesday morning (Rec., 1360): District Attorney Fanelli testified that he learned of the arrest of peti-

tioner Cooper only on Tuesday afternoon, June 6, when at his office he was questioning Arthur Jepperson, a witness for the prosecution who was present at the time that Cooper was arrested in New York City on Monday morning (Rec., 788, 789, 1225). Did the District Attorney rush to the barracks to question Calman Cooper on Tuesday afternoon? He testified that he did not go to the barracks, or even telephone on Tuesday to inquire about the petitioner (Rec., 1225, 1226), even though he admittedly then knew about petitioner's arrest (Rec., 1225-1226). Nor did he complain about the Troopers' failure to arraign the petitioner Cooper on Monday night (Rec., 1227). Although Dorfman—much later—was arraigned *on the very night of his arrest*, the District Attorney did nothing to cause the arraignment of Cooper on Monday night, on Tuesday night or on Wednesday night, or on Thursday morning or on Thursday afternoon, despite the fact that the New Castle Court was available for arraignments *at any time or any hour* (Rec. 1270). The District Attorney was under the impression—contrary to the specific command of a New York State Statute*—that the law tolerates “a certain reasonable delay” (Rec., 155, 1226). Capt. Glasheen, commander of Troop K of the State Police, was of the opinion that he could wait until the rest of the suspects were *taken into custody* (Rec., 2008).

Ward v. Texas, 316 U. S. 547, 550;

McNabb v. United States, 318 U. S. 322;

Ashcraft v. Tennessee, 322 U. S. 143;

Malinski v. New York, 324 U. S. 401, 404;

Turner v. Pennsylvania, 338 U. S. 62;

Harris v. South Carolina, 338 U. S. 68.

* Sect. 165 of the Code of Criminal Procedure. Rule 5 of the Federal Rules of Criminal Procedure, like the State Statute, provides for arraignment “without unnecessary delay.” Section 1844 of the Penal Law of the State makes it a penal offense to disobey.

The petitioner Cooper, with Stein and Wissner, was arraigned at about 10:00 P.M. on Thursday, June 8—*almost 85 hours after his arrest* (Rec., 1268, 2150).

None of the three petitioners was represented by counsel, none had a single friend or relative present. Not a single member of the Bar, excepting the prosecutors, was present that night (Rec., 2177). The petitioners appeared before the Court handcuffed (Rec., 1330), and surrounded by numerous State Troopers (Rec., 2894). The presiding magistrate, himself, permitted the taking of a photograph from behind his bench (Exh. 62, Rec., 2894), during the actual arraignment in his courtroom, in violation of a specific prohibition of the Rules of the Appellate Division of the Supreme Court covering his judicial Department* (Rec., 2014).

It is of little significance here that Cooper did not complain of a beating before the Committing Magistrate on Thursday night. He had been within the absolute power of the State Troopers for *three and a half* days. There was no proof as to whether his mind, or the mind of Stein or Wissner, was functioning; whether they had had sufficient sleep or food; or whether they had received any drug.

The interesting and revealing photograph of the courtroom arraignment (Exh. 62, Rec., 2894)—the photograph does not show all the Troopers who were in the courtroom (Rec., 1327)—shows how completely the three, cowed and visibly handcuffed in court, were surrounded by armed Troopers.

The State Troopers, after the arraignment, continued to have custody of Cooper and his two co-petitioners. Shortly before midnight, on Thursday, June 8th, the State Police lodged Calman Cooper and his two co-petitioners

* Special Rule adopted on April 20, 1938, by Second Department.

in the Westchester County Jail (Rec., 1273, 1858). The three were separately locked in widely separated cells in different cell-blocks (Rec., 1273, 1858).

On Friday morning, June 9th, Cooper, Stein and Wissner appeared before the jail physician, Dr. Vosburgh. Only about ten hours had elapsed from the time the State Troopers lodged them in the County Jail until each was brought to Dr. Vosburgh;—each from his separate, distant, solitary, individual cell.

We now discuss the jail conditions during the ten hours preceding the petitioner's appearance before the jail physician to prove the falsity of the prosecution's attempted explanation of the injuries that Dr. Vosburgh found.

Exhibit QOO, on page 3008, is a page of the Official Book of the Westchester County Jail. It shows that Nathan Wissner, taken from Cell No. 2F3, was the first one examined; Harry Stein, taken from Cell 2B7, was the second; Calman Cooper, taken from Cell 2A1, was the third.

Exh. QQQ, on page 3014, is the sketch of part of the jail. Stein is in the cell in the upper right. Cooper is in the cell in the lower left. Wissner is elsewhere, not in the same area.

Maynard A. Allen, a Deputy Warden connected with the County jail, testified to facts which completely negated the possibility that Cooper, Stein and Wissner could have connived to inflict the injuries on themselves so as to present themselves in the condition in which Dr. Vosburgh found them. Allen testified that Sgt. Sayers brought the prisoners to the County Jail at 11:45 P.M., on June 8, 1950 (Rec., 1273, 1858). Stein's cell, we have shown, was on one extreme and Cooper's cell was on the other extreme, of the Cell Block (Rec., 1867). No other prisoner occupied any cell on Cooper's side; no other prisoner occupied any cell on Stein's side (Rec., 1869). The cells of

these prisoners were barred at all times, except when the keeper went there (Rec., 1869). The two cell blocks shown in the diagram were three and a half feet apart. They were fifty feet in length. They had solid walls (Rec., 1870). There was only a twenty inch-square ventilating screen in each cell, with a heavy wire mesh (Rec., 1870). The corridor was dark. One prisoner could not see another prisoner in a cell.

Wissner, also, was in a cell by himself. There were only empty cells along his side of the cell block, too. All three prisoners were kept in solitary confinement (Rec., 1875). Wissner's cell is not shown on the diagram in evidence, because, as explained before, it was in a different part of the jail (Rec., 1882).

The physical set up and barriers in the jail were thus such that the opportunity at connivance at self-inflicted injuries was impossible, unless defendants had recourse to shouting—of which there is no evidence—and which would have awakened the entire jail and exposed defendants to discovery and detection by the prison guards.

Deputy Warden Allen brought each prisoner *alone* from his cell to Dr. Vosburgh's clinic, and returned each prisoner *alone* from the clinic to his own cell (Rec., 1860). No other prisoner was present when the doctor examined each one individually (Rec., 1860).

It is apparent, therefore, that Wissner, the first to be brought to the clinic, was examined alone that Friday morning; that Stein was examined alone, and that Cooper was examined alone. It must tax this Court's credulity, that the District Attorney could argue that Cooper, Stein and Wissner inflicted upon themselves, for any ulterior purpose, the injuries which Dr. Vosburgh officially noted that morning—a few hours after their release from the custody of the Troopers (Rec., 2708, 2713).

We now note the injuries Dr. Vosburgh found on each of the three petitioners.

On Wissner, the non-confessing defendant arrested at 9:00 A. M. on Wednesday, June 7, and the first prisoner he examined Friday morning (Rec., 1754), Dr. Vosburgh noted and officially recorded "bruises (on) left posterior lateral chest", with "abrasions (on) both shins", evidently open wounds (Rec., 1771). Dr. Vosburgh also noted a fracture of a rib (Exh. PPP, Rec., 3011), later confirmed by an X-ray report of Wissner, taken three days later, which read as follows: "There is a fracture of the left sixth rib, slightly anterior to the mid axillary line. The fragments are without appreciable displacement" (Rec., 2957). On the day that Wissner was X-rayed, Dr. Vosburgh also noted "small ecchymotic areas of both thighs, small ecchymotic area of the left side of abdomen and buttocks (and, a) small lump on head" (Rec., 3012).

On Stein, second to be examined alone, Dr. Vosburgh reported officially "bruises (on) left bicep area" (Rec., 2909), "in the left upper arm, between the elbow and shoulder" (Rec., 1713). John J. Duff, Stein's attorney, examined him a few hours later, and made a more detailed observation of the injuries of Stein (Rec., 1838). He observed "bruises on the left arm, his right arm and left lower ribs below the breast" (Rec., 1839).

On petitioner Cooper, last of the three to be examined (Rec., 3008), Dr. Vosburgh noted "bruises (on the) left posterior lateral chest, abdomen, (in the) right bicep area (and on) both buttocks" (Rec., 2971; 1237-9, Exh. BBB, 2971), black and blue marks (Rec., 1238), and injuries under the left armpit (Rec., 1244).

We shall now detail events which showed the resistance of the District Attorney to our efforts to perpetuate full proof of the injuries of Calman Cooper. We shall also point out his conduct, which clearly indicates that there

was no desire on his part to question the Troopers about their brutality. His failure to do so, is positive indication that Cooper and the others were beaten and that, therefore, it would have been a futility for the prosecutor to probe the Troopers about a charge of brutality that was true.

Mr. Thomas J. Todarelli, a member of the Bar, together with his law partner, Peter L. F. Sabbatino, visited Cooper on Saturday, June 10th. He found at the County jail, Daniel J. Riesner, another attorney, who was then visiting Cooper (Rec., 1259). Cooper stripped in the presence of the attorneys (Rec., 1260). Mr. Todarelli noted the injuries of Cooper on Saturday, June 10th, at 2:00 P. M. (Rec., 1260). A complete description of Cooper's injuries, as noted by Mr. Todarelli, is found on pages 1260 to 1262 of the certified record. Mr. Todarelli's description supplements Dr. Vosburgh's report (Exh. BBB, Rec., 2971).

District Attorney Fanelli admitted that Cooper's attorney telephoned him on Saturday, June 10th (Rec., 1228, 1229). He admitted receiving and reading our telegram that same Saturday (Rec., 1231). He recalled that on that same Saturday we asked him for permission to have a physical examination of the defendant Cooper (Rec., 1284). Mr. Fanelli conceded that we complained to him on June 10th concerning the Vosburgh report of June 9th (Rec. 1294). He admitted further that we complained about the inadequacy of the examination (Rec., 1294). The telegram contained, in part, the following language: "official records do not show true extent of injuries he received" (Exh. ccc, telegram, Rec., 2793; 1290, 1291).

In spite of these protestations, Cooper's attorneys did not succeed in inducing Mr. Fanelli to consent to an examination by another physician on that Saturday or at any other time.

Swarz, the photographer at the jail in which petitioner was held, testified that the facilities and equipment were available, and he was capable of taking a full length picture of the petitioner, stripped, were he so ordered to do (Rec., 2187).

On Tuesday, June 13th, Mr. Todarelli appeared before the then County Judge, Hon. Elbert T. Gallagher, who subsequently presided at the trial in this case, and complained to him about the mistreatment of Cooper and requested that a physical examination of Cooper be permitted (Rec., 2982-2983). A transcript of Mr. Todarelli's application before Judge Gallagher, and the resistance of the District Attorney to have Cooper examined, are contained in Exh. ddd for identification, pages 2974-2981. This exhibit the Court refused to receive in evidence at the trial (1258, 1259). On June 15th, Judge Gallagher again refused to permit a physical examination of Cooper by another Doctor (Rec., 12, 13; 2989, 2990).*

District Attorney Fanelli further admitted that Cooper sued out a writ of habeas corpus, returnable before Mr. Justice Flannery. The State Supreme Court denied relief (Rec., 1308-1309). The petition for the writ and the affidavit of the District Attorney in opposition in the State Supreme Court, appear on pages 2984-2988, and are marked Exh. fff for identification. They were denied admittance in evidence over our exception (Rec., 1283).

A serious complaint of police brutality, supported by Dr. Vosburgh's report evidencing injuries, having been

* Mr. Todarelli, on the arraignment, addressed Judge Gallagher, in part, as follows:

"* * * there cannot be any danger whatever of showing to your Honor here in open court the marks of violence that were inflicted upon the defendant and which he now bears, even though a week has elapsed since the last of the beatings took place. * * * I now offer to show your Honor the marks that appear upon this man's body here in open court. If your Honor does not do that I stand prepared to produce a Westchester physician; it can be done in open court or in chambers."

made promptly to the District Attorney by three members of the Bar, in a case involving a charge of murder, where a confession had been obtained as a result thereof, as charged by the defense—what was the District Attorney's sworn duty? Was it not his duty to investigate at once to ascertain the facts so as to brand the accusation as false or to accept it as true?

District Attorney Fanelli testified that he did talk to some of the Troopers about our accusations (Rec., 1233). However, he did not recall when he questioned them, nor did he make a stenographic record, nor any kind of official record of his interviews with those Troopers (Rec., 1233), nor did he make any private notes (Rec., 1233). None of the Troopers who took the stand, however, testified that he was ever questioned by the District Attorney about any beating of Cooper.

Trooper Buon, one of the trio of "questioners", testified that he was never questioned by Mr. Fanelli, nor was he ever questioned by anyone else as to whether he had ever beaten Cooper (Rec., 2125). His superiors, Sgt. Sayers and Sgt. Barber, never questioned Buon. Capt. Glasheen never questioned Buon (Rec., 2125). Strange as it may seem, Trooper Buon testified that he had heard about Cooper's black and blue marks for the first time when he testified on the witness stand (Rec., 2124).

Capt. Glasheen was commander of Troop K of the State Police at Hawthorne, New York. He had never heard that we had sent District Attorney Fanelli a telegram (Rec., 2047), nor was he ever questioned by the District Attorney about its contents (Rec., 2048). As a matter of fact, the first time he had heard of our telegram was while he was on the witness stand, under questioning of Cooper's defense counsel (Rec., 2048). Capt. Glasheen admitted that he was never questioned by the District Attorney about the charges of brutality against his Troopers made by

Cooper's Attorney in that very courtroom, nor was he ever questioned by anyone else (Rec., 2048). The charges made by Mr. Todarelli before Judge Gallagher were never called to Capt. Glasheen's attention (Rec., 2049), nor had any Trooper, he admitted, ever told him that such charges had ever been made on Tuesday, June 13th (Rec., 2049).

The stenographer, Anna A. Klaus, was never questioned by anyone about her knowledge of any beatings of Cooper (Rec., 1650).

Corporal McLaughlin, who typed the confession, was never questioned by the District Attorney, about the beatings of Cooper up to the very moment that he was on the witness stand. *He knew of no one in Troop K that had ever been questioned by Mr. Fanelli* (Rec., 1217). Dr. Vosburgh's report was never called to Corporal McLaughlin's attention (Rec., 1217). No one in official authority had ever questioned him about the beating of Cooper (Rec., 1218).

John F. Reardon, attached to the New York State Division of Parole (Rec., 1441), testified that he was at the barracks on Monday, June 5th, at 7:00 P.M. (Rec., 1441). He did not see Cooper that night, although he remained there until 9:00 P.M. (Rec., 1441), and he knew that Cooper was there on a murder charge (Rec., 1462). He returned on Tuesday about 7:00 P.M. and, at about 8:00 P.M., saw Cooper, whom he had never seen prior to that evening (Rec., 1441, 1442, 1448). He never saw, and never spoke to, Cooper alone, but always in the presence of a State Trooper (Rec., 1464).

Reardon was a witness to the written confession. He testified that he was never told by the District Attorney, nor by any one else, before he took the witness stand, that the defense claimed that Cooper's confession was brought about by beatings (Rec., 1466). He never heard it from the District Attorney, nor from any of his assistants

(Rec., 1467). He admitted that he had heard at the barracks that there were newspaper reports about the alleged beatings (Rec., 1468), but he could not name any specific Trooper with whom he had had any such discussion (Rec., 1448). He never asked to go to see Cooper to seek verification of the truth or falsity of the report (Rec., 1469).

Assistant District Attorney O'Brien made the statement, in open Court before the jury, "that the press never did carry a story that the defendant was beaten" (Rec. 1470). To meet the challenge of the Assistant District Attorney, we offered in evidence a headline contained in the Reporter Dispatch, published on Tuesday, June 13, 1950, in the City of White Plains, where the trial of this cause took place (Exh. 3 for identification, p. 3000). Although the Assistant District Attorney was shown the newspaper headline (Rec., 1471), he refused to retract his statement, the Court refused to direct him to do so (Rec., 1473), and the newspaper clipping, which disproved Assistant District Attorney O'Brien's statement before the jury, was denied admission in evidence, over our exception (Rec., 1472).

Mr. Reardon, even up to the time that he took the stand, had never telephoned to Mr. Fapelli to check on the charges that Cooper had been beaten (Rec., 1474). He never sought to speak to Cooper privately at the time Cooper was asked if the statement was voluntary (Rec., 1479), although he had heard of the "Third Degree" (Rec. 1478). He did not ask that Cooper be stripped to be sure that he had not been beaten (Rec., 1480). He made no inquiry as to whether Cooper had been fed, or whether he had received water to drink (Rec., 1484). He made no inquiry as to whether Cooper had slept (Rec., 1485), nor whether he had been denied toilet facilities (Rec., 1486). He did not ask Cooper whether he had been forced to stay awake (Rec., 1486). He never even asked to speak to Cooper's father (Rec., 1488).

Thus the statement by Cooper in his confession—that it was voluntary (Rec., 2886)—becomes meaningless, even though witnessed by Reardon. In the light of the foregoing significant facts elicited during Reardon's examination, his testimony that he noticed no wounds on Cooper's body (Rec., 1449, 1454), are mere empty words, for the wounds of Cooper were beneath his clothing, and therefore not visible to this witness, who displayed utter indifference to ferret out facts to challenge the veracity of the voluntariness of the confession, despite the fact that Cooper had been under arrest and not arraigned for 36 hours when the Troopers began to take his written confession.

Sgt. Sayers, a "questioner" of Cooper, admitted that Mr. Fanelli never informed him about Mr. Todarelli's accusations, made Saturday morning, June 10th. Sayers testified that he was never questioned by Mr. Fanelli, or by any of Mr. Fanelli's assistants, about the charges made by Cooper. Nor had Mr. Fanelli ever called to Sayer's attention Dr. Vosburgh's report (Rec., 1362, 1363).

*Sgt. Sayers sought to account for Cooper's injuries by an explanation patently shown to be false by the testimony of Jepperson, a prosecution witness, and by Dr. Vosburgh, the jail physician. When Sayers searched Cooper at the time he arrested the petitioner, Sayers found on Cooper a black notebook (Rec., 1332) which, Sayers said, "was not what I was looking for, and with that, I took him and grabbed him by both arms and as he started to wheel around; I threw him against the building" which "has a cement wall" (Rec., 1310, 1311). Strangely enough, Sayers admitted on cross-examination that it was the fact that he found on Cooper this black *note-book* which prompted him to push Cooper against the building (Rec., 1332).

Sayers further admitted that he pushed Arthur Jepperson "the same way" (Rec., 1332). But Jepperson, called by the District Attorney as his witness, flatly contradicted

Sayers' testimony and swore, under questioning by Mr. Fanelli, that he "wouldn't say that they pushed him" (Cooper) (Rec., 810).

Sayers testified that he pushed Cooper *only once* (Rec., 1332). But Dr. Vosburgh testified that the injuries Cooper had could be accounted for only "by being thrown against a stone wall *numerous times*" (Rec., 1253).

That Sayers' explanation was a recent futile fabrication by him is shown by his own words as well as by the conduct of the prosecutors. The charge of brutality, we have shown, was made on June 10, and yet, it was not until September, or October, or November, that Sayers gave Mr. Fanelli his "explanation" (Rec., 1334). Mr. Fanelli conceded at the trial that he never took any statement from Sayers, in which Sayers gave his court-room explanation of Cooper's injuries (Rec., 1333).

That the explanation offered by Sgt. Sayers was a recent fabrication, born of necessity, is further proved by Dr. Vosburgh's testimony. The jail physician testified that the District Attorney had never questioned him about the report that he had filed, in which he detailed Cooper's injuries (Rec., 1251). It was not until October or November—that is, about the time the trial began or was scheduled to begin—that Mr. Marbach and Mr. John O'Brien, two Assistant District Attorneys who participated in the trial (Rec., 112), discussed his report with him (Rec., 1258). However, it is significant that the two prosecutors did not urge, at the interview, that Cooper had been knocked against a stone wall by anyone, or that someone had grabbed Cooper forcibly by the biceps (Rec., 1258).

However, as we have previously noted, the District Attorney, in his summation, evidently abandoned the "grip-stone-wall" explanation of Sayers as too palpably false and relied on the "self-inflicted" theory, for the support of which there was a total lack of any evidence whatsoever.

If the injuries were self-inflicted, they could only have been self-inflicted during the 10 hours that the three petitioners spent in the County Jail before their examination by Dr. Vosburgh. That theory was exploded by Dr. Vosburgh, who testified that the injuries of Cooper were "possibly not a week" (old), but "possibly six days" (old), Rec., 1246), and that blows with a human fist, rubber hose or a club, were a competent producing cause (Rec., 1240).

None but the gullible could naively believe that Wissner, who had not confessed, would, during those 10 hours following his arraignment, fracture one of his ribs and injure himself to the extent found by Dr. Vosburgh.

We respectfully contend, therefore, that this Court has the power to do and should do what the trial Court failed to do—reject the confession as not freely made, because there was in law no issue of fact to be submitted to the jury.

Lisenba v. California, 314 U. S. 219, 240;

Ward v. Texas, 316 U. S. 547, 550;

Ashcraft v. Tennessee, 322 U. S. 143, 145;

Haley v. Ohio, 332 U. S. 596, 599, 600.

Federal Constitutional guarantees protect the petitioner from the use against him of a confession which was palpably extorted and incontestably obtained during a period of time after he should have been arraigned.

State courts do frequently reverse when an extorted confession is admitted in evidence.

People v. Barbato, 254 N. Y. 170, 176;

People v. Mummiani, 258 N. Y. 394, 398.

A Constitutional guarantee, however, is not sustained but impaired where State courts give it only lip service and enforce it only by a repetition of generalities, as a trial judge did here, but sanction its violation by disregarding its protecting nature in actual practice.

It is this Court alone that can sustain the integrity of the due process clause where State Appellate Courts shut their eyes to a clear violation and, by affirming without opinion, impliedly sanction, in the twentieth century, a practice of torture condemned in every civilized state in the Western World.

A criminal, however shocking his crime, is not to answer for it with forfeiture of life or liberty till tried and convicted in conformity with law.

People v. Moran, 246 N. Y. 100, 106;

People v. Levan, 295 N. Y. 31, 32.

Having allowed the confession of Stein and of your petitioner to be marked in evidence and given to the jury, the trial court instructed the jurors that unless they found that the confessions were voluntary, they should disregard their contents in reaching a verdict (Rec., 2767); but the trial court improperly refused to instruct the jurors to return a verdict of acquittal if they found that your petitioner's confession was not voluntary (Rec., 2778, 2781).

The trial court refused, although specifically requested so to do, to submit to the jury as a specific question, to be answered as part of the verdict, whether your petitioner's confession was brought about by fear induced by threats. The same request on behalf of Stein was likewise denied (Rec., 2783).

A judgment of conviction will be set aside by this Court even though the evidence, apart from the confession, might have been sufficient to sustain the jury's verdict.

Lyons v. Oklahoma, 322 U. S. 596, 597;

Malinski v. New York, 324 U. S. 401, 404;

Gallegos v. Nebraska, 342 U. S. 55.

For all the foregoing reasons, it is respectfully submitted that the confession of the petitioner Cooper, being involuntary and obtained in violation of Section 395 of the Code of Criminal Procedure and of the due process clause of the State and Federal Constitutions, the trial court erred in submitting, over objection and exception, the voluntariness of the confession as a question of fact for determination by the jury.

Conclusion

No matter how clear the guilt of a defendant in any particular case may appear to arresting officers, prosecutors or judges, yet, this Court speaking for a civilized society, must not countenance a course of conduct which is repugnant to all but those blinded by an interest in a particular prosecution. Petitioner's rights under the Constitution have been unlawfully invaded.

The writ of certiorari should be granted.

Respectfully submitted,

PETER L. F. SABBATINO,
Counsel for Petitioner.

PETER L. F. SABBATINO,
THOMAS J. TODARELLI,
DANIEL J. RIESNER,
Of Counsel.

APPENDIX A

United States Constitution, Amendment XIV, Section 1

“nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

APPENDIX B

Title 28, Sec. 1257, U. S. Code

“Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

“(3) By writ of certiorari where any right, privilege or immunity is specially set up or claimed under the Constitution of the United States.”

APPENDIX C

Federal Rules of Criminal Procedure:

Rule 5. Proceedings before the Commissioner.

“(a) Appearance before the Commissioner. An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person *without unnecessary delay* before the nearest available commissioner or before any other nearby officer empowered to commit persons charged with offenses against the laws of the United States.”

APPENDIX D

Code of Criminal Procedure of New York, Sec. 165:

“The defendant must in all cases be taken before the magistrate without unnecessary delay, and he may give bail at any hour of the day or night.”

APPENDIX E

Penal Law of New York, Sec. 1844:

“A public officer or other person having arrested any person upon a criminal charge, who wilfully and wrongfully delays to take such person before a magistrate having jurisdiction to take his examination, is guilty of a misdemeanor.”

APPENDIX F

Penal Law of New York, Sec. 1044:

“The killing of a human being, unless it is excusable or justifiable, is murder in the first degree, when committed: * * *

“2. * * * without a design to effect death, by a person engaged in the commission of, or in an attempt to commit a felony, either upon or affecting the person killed or otherwise:”

APPENDIX G

Section 399 of the Code of Criminal Procedure of the State of New York

“A conviction cannot be had upon the testimony of an accomplice, unless he be corroborated by such other evidence as tends to connect the defendant with the commission of the crime.”

APPENDIX H

Section 395 of the Code of Criminal Procedure of the State of New York

Confession of defendant, when evidence, and its effect.

“A confession of a defendant, whether in the course of judicial proceedings or to a private person, can be given in evidence against him unless made under the influence of fear produced by threats,—but is not sufficient to warrant his conviction, without additional proof that the crime charged has been committed.”

78 of the New York Civil Practice Act (see Exh. II for ident.). The proceeding was instituted at the earliest opportunity, by assigned counsel, whose assignment was not made by the Court until July 24, 1950 (14, 15), though application therefor had been made by Stein personally on June 16, 1950 (1843-1849). It should be further noted that there were, concededly, also six formal complaints made on behalf of Cooper (1228-1307; 2974-2983; 2984-2996; 1882), and two complaints on behalf of Wissner (1873-1874), and that all such complaints were "vigorously" opposed by the District Attorney (1874), and all were rejected.

It may be that Dr. Vosburgh's records, containing no mention of complaint by Stein, are "unalterable" (Respdt's Brief, p. 27), but it is also undisputed that this same doctor, a county official, in practice some six years at the time, discriminated between his private and prison patients with respect to the questions which he directed to each to ascertain the medical history of complaint (1763, 1767, 1786, 1818). Dr. Vosburg stated "If they complain that they were beaten or anything of that sort I usually make a note on the sheet" (1243-1244). Also (1728), when asked "Didn't Stein tell you that he got that condition as the result of blows by State Troopers * * *?", he stated "There is no note here of any statement of that sort, and it usually has been my practice, in a case of that sort, to make a note". Yet, when challenged to produce samples of such notes, made during examinations of prisoners *other than the defendant*, Vosburgh admitted that there were none (1729), this despite his stated "usual practice".

It will be noted that, in the absence of any complaint by the defendant in *Malinski*, this Court nevertheless ruled his confession invalid. In *Turner, supra*, and *Johnson, supra*, the respondent in each case also argued failure of complaint, and the contention was disregarded by this Court.

This Court, petitioner is confident, will not be unduly concerned with the claimed desire of the New York State Police to arraign the three defendants simultaneously. It is the law of the case that the arraignment of all three petitioners was, as a matter of law, unnecessarily delayed. But, since the State Police did not have the time and leisure to extract a confession from Wissner that they had had in the cases of Cooper and Stein, they were, it is suggested, less careful, more anxious and more forceful in the interrogation and treatment of Wissner, and carelessly inflicted a fracture of the rib of Wissner, which was revealed upon the physical examination of Wissner by Dr. Vosburgh, the morning after the arraignment.

With a shocking disregard of the proprieties, and of the rights of these petitioners, Respondent refers (Respdt's Brief, p. 36) to the criminal records of petitioners, as they appear in the pedigrees taken by the Clerk after conviction. The answers which petitioners made to the Clerk's questions formed no part of the trial record, and any reference to them, in support of the argument that petitioners "were not unsophisticated youths, but mature males familiar with criminal court procedure" (Respdt's Brief, p. 36) is most improper. In any event, the argument is self-defeating, for if petitioners, by reason of their prior experience, were so thoroughly aware of the gravity and dread consequences of a confession, it is unthinkable that they would have, like so many immature, callow youths, made voluntary confessions of guilt whereby their lives might be forfeited, except under conditions of mental and physical compulsion. Indeed, the only rational conclusion to be drawn from the very criminal records which Respondent so improperly injects is that petitioners, *precisely because of their past experiences*, did resist vigorously, each to the limit of his endurance, any effort to obtain a confession. The injuries noted on the bodies of all three petitioners is mute proof of their resistance, within the limits of their respective endurance. In this regard it is appropriate to note that Stein was 52 years of age.

The right to due process stands foremost among the rights which the founding fathers carved out of the English Petition of Right*. We respectfully urge that to place this Court's seal of approval, even tacitly implied, upon the manner in which these confessions were obtained would not only be a negation of this ancient and traditional right, but would serve to enthrone police brutality throughout the land. Secure in the knowledge that precisely such odious practices as we have outlined have been noted with indifference, if not sanctioned, by the highest court in the land, police officers could then, and assuredly would, with impunity, make of these evil tactics the standard procedure in obtaining confessions.

The lamentable practices resorted to and admitted by the police in this case, as fully enumerated in petitioner's petition and brief herein (pp. 5-6, 26-27), cannot be squared with the decisions of this Court to which we have referred. These decisions show clearly that any one of the grounds raised is sufficient to require petitioner's conviction to be set aside (*Ward v. Texas, supra*, 555). When illegally delayed arraignment, holding of petitioner incommunicado, intensive interrogation and brutal beatings all occur in one case, the accumulated enormity of the error is such that, upon the tainted product of such official misconduct, the petitioner cannot, with justice, be sent to his death.

Respectfully submitted,

PHILIP J. O'BRIEN,
JOHN J. DUFF,
Counsel for Petitioner.

PHILIP J. O'BRIEN, JR.,
Of Counsel.

* The Petition of Right (1628) addressed by Parliament to the king, refers to the fact that "in the eight and twentieth year of the reign of King Edward the Third, it was declared and enacted by authority of Parliament, that no man of what estate or condition that he be, should be put out of his lands or tenements, nor taken, nor imprisoned, nor disinherited, nor put to death, without being brought to answer by due process of law".